No. 90-609

IN THE
# Supreme Court of the United States
October Term, 1990

REICHHOLD CHEMICALS, INC.,
*Petitioner,*

v.

TEAMSTERS LOCAL UNION NO. 515, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND NATIONAL LABOR RELATIONS BOARD
*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## BRIEF *AMICUS CURIAE* OF THE SOCIETY OF THE PLASTICS INDUSTRY, INC. IN SUPPORT OF PETITIONER

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## BRIEF *AMICUS CURIAE* OF THE SOCIETY OF THE PLASTICS INDUSTRY, INC. IN SUPPORT OF PETITIONER

This brief is respectfully submitted on behalf of The Society of the Plastics Industry, Inc. (sometimes referred to as "SPI"), as amicus curiae. Pursuant to Rule 37.2 of the rules of this Court, SPI has obtained and filed the written consent of each of the parties to the filing of this brief. SPI supports the position of the Petitioner in this case, requests that the petition be granted and urges that the decision below be reversed.

This case addresses the appropriate test for determining whether an employee strike is an "unfair labor practice strike" within the meaning of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (sometimes referred to as "the Act"). The question presented to the Court is whether a strike can be characterized as an unfair labor practice strike when: (i) the unfair labor practice in question was never communicated to the striking employees before they voted to strike, and (ii) the decision of the employees to strike was based solely on a union official's subjective recommendation to strike.

## INTEREST OF AMICUS CURIAE

The Society of the Plastics Industry, Inc. is a 2,000 member not-for-profit corporation organized under the laws of the State of New York. The Society's members include processors and manufacturers of plastics or plastics products, suppliers of raw materials, processors and converters of plastics resins, and manufacturers of accessory equipment of the plastics industry. Founded in 1937, SPI is the major national trade association of the plastics industry.

The U.S. plastics industry employs approximately 1.5 million workers. There are over 12,000 domestic plastics production facilities located throughout the 50 states. Virtually all plastics industry employers are subject to the National Labor Relations Act. Many plastics industry facilities, including those of certain SPI member companies, are unionized and, therefore, are subject to the particular labor relations principles at issue here. Moreover, the court of appeals' decision has far-reaching implications for the conduct of collective bargaining agreements in general and for the free flow of commerce. SPI members will be affected by any disruption to the bargaining process and by any obstruction to commerce.

The resolution of the issues raised by this case will affect future decisions of the National Labor Relations Board (sometimes referred to as "NLRB") and of the courts. Thus, although in theory the resolution of this case will affect only these particular parties, in reality, the practical impact of the decision will be broad, affecting virtually all private-sector employers whose employees are represented for collective bargaining purposes by labor organizations, as well as those firms whose employees may be organized in the future. For this reason, the Court's decision in this case or its failure to correct the decision below will have a direct and substantial effect on SPI and its members.

## SUMMARY OF ARGUMENT

The court of appeals' holding that the employees' decision to strike in this case was caused by the employer's unfair labor practice, even though the voting employees had no awareness of the unfair labor practice in question, frustrates the policies and purposes of the National Labor Relations Act. The decision impedes a fair collective bargaining process and may create increased industrial unrest, discourage peaceful employee self-organization, and obstruct the free flow of commerce — all key objectives Congress sought to achieve in the Act. The court's decision here conflicts with its own prior case law, as well as that of the U.S. Court of Appeals for the Fifth, Sixth, Seventh, and Ninth Circuits. Further, the decision rejects the well-settled test established by the NLRB — the tribunal Congress created to administer the federal labor relations laws — for determining whether an unfair labor practice strike has occurred. The decision has broad implications for employers, labor organizations, and employees (including those workers who are now organized and those who may face questions concerning union representation in the future).

## ARGUMENT

### I. The Court of Appeals' Decision Will Frustrate the Purposes and Policies Underlying the National Labor Relations Act.

The overriding purpose of the National Relations Labor Act is to remove obstructions to the free flow of commerce by eliminating certain recognized sources of industrial strife. *See NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939); *NLRB v. Waumbec Mills, Inc.*, 114 F.2d 226, 232 (1st Cir. 1940). In Congress' judgment, both employer interference with employee organization within the workplace and certain union practices, such as strikes, have the effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce. 29 U.S.C. § 151. Therefore, Congress declared it to be the policy of the United States to protect the domestic commerce by encouraging the practice and procedure of collective bargaining and by protecting employee rights to self-organization. *Id.*

To effectuate its goals, Congress prohibited certain unfair labor practices by employers and labor organizations alike. 29 U.S.C. § 158 (a) and (b). Moreover, it created the National Labor Relations Board to "give coordinated effect to the policies of the [National Labor Relations] Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953). Congress "confide[d] primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision . . ." *Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees of America, et al. v. Lockridge*, 403 U.S. 274, 287 (1970), *reh'g denied*, 404 U.S. 874 (1971) (quoting *Garner v. Teamsters, Chauffeurs and Helpers Local Union*, 346 U.S. 485, 490-91 (1953)).

The NLRB, in its capacity as the primary adjudicator of labor disputes, is frequently called upon, as it was here, to determine whether an employee strike is an unfair labor practice strike or an economic strike. The distinction is critical to both sides of a labor-management dispute: unfair labor practice strikers "do not lose their status [as employees] and are entitled to reinstatement with back pay, even if replacements for them have been made." *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898, 905 (5th Cir. 1978) (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956), *reh'g denied*, 351 U.S. 980 (1956)). In making this determination, the NLRB has applied a consistent test that focuses objectively on whether the striking employees were aware of the unfair labor practice in question and what actually motivated the employees to vote to go on strike. *See, e.g., Vanguard Tours, Inc., et al.*, 300 N.L.R.B. No. 30 (1990); *Airport Parking Management*, 264 N.L.R.B. 5 (1982), *enforced*, 720 F.2d 610 (9th Cir. 1983); *Burlington Homes, Inc. and United Brotherhood of Carpenters and Joiners of American, AFL-CIO a/k/a Carpenters Industrial Council of Eastern Pennsylvania*, 246 N.L.R.B. 1029 (1979).

In this case, the court of appeals rejected this objective test and instead adopted a subjective test for determining whether an employee strike will be characterized an unfair labor practice strike. Under the court of appeals' test, a union representative's unexpressed subjective reasons for recommending a strike can be imputed to the employees who voted for the strike. *Teamsters Local Union No. 515, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB*, 906 F.2d 719, 724-26 (D.C. Cir. 1990). According to the court of appeals below, an employee strike may be "caused" by unfair labor practices, and therefore characterized as an unfair labor

practice strike, even though the person or persons responsible for deciding to strike had no specific knowledge of the unfair labor practice.

By focusing only on what a union official believes to be the cause of the strike, rather than on what the striking employees believe to be its cause, the court of appeals' decision disturbs the delicate balance between employers and labor organizations created by Congress in the National Labor Relations Act. As a result, employers will be hesitant to engage in hard, lawful bargaining for fear that a breakdown in that bargaining and a subsequent employee strike could be instantly converted from an economic to an unfair labor strike by the mere *post hoc* rationalization of a union official. Moreover, by allowing a strike to be so converted, employers' rights and the rights of replacement workers will be diminished. These effects are contrary to the purposes and policies underlying the Act.

By tipping the collective bargaining power in favor of employees and their unions in this critical area, the decision below may well lead to more frequent labor strikes. Congress recognized that the industrial strife it sought to avoid was not solely caused by employers when it stated,

> [e]xperience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

29 U.S.C. § 151.

Because the court of appeals' decision allows employees to insulate themselves against a finding that the cause of their strike was economic, not unfair labor practices, by simply adopting the unexpressed or unexplained representation of their union official, employees will encounter less risk in striking and will be more prone to strike rather than continuing to bargain. A reduction in strikes, and their ill effects on the common good, was central to Congress' purposes in enacting the National Labor Relations Act. The court of appeals' decision thwarts this purpose.

Finally, because the court of appeals' decision effectively posits the determination of the cause of a strike in a union official's mind, rather than in the neutral and expert NLRB, the decision may hamper, not encourage, full freedom of association and self-organization. Faced with uncertainty in the collective bargaining process, and a disadvantaged bargaining position, employers whose workforces are not currently organized may actively oppose unionization efforts. Again, the result is increased industrial unrest, instead of the industrial peace Congress intended to advance by the Act.

## II. The Decision Below Creates a Conflict Between the Circuit Courts.

The court of appeals found that the determination that a strike was caused by unfair labor practices can be based on what a union official knew about such unfair labor practices, not what he communicated to the decisionmakers — the striking employees. The decision is a departure from the NLRB's longstanding objective test, as well as from the D.C. Circuit's own precedent. Moreover, it conflicts with the position of other federal appellate courts which have previously addressed the issue.

In its decision in *Road Sprinkler Fitters Local 669 v. NLRB*, 681 F.2d 11 (D.C. Cir. 1982), *cert. denied sub nom. John Cuneo, Inc. v. NLRB*, 459 U.S. 1178 (1983), the court of appeals followed the NLRB's traditional test for determining the character of a strike. The court affirmed the Board's reversal of the Administrative Law Judges's decision that a strike had been an unfair labor practice strike because the striking employees were aware of the unfair labor practices prior to the strike. In so doing, it articulated the NLRB test as follows:

> 'Board law holds that an unfair labor practice strike does not result merely because unfair labor practices precede the strike. Rather, there must be a causal connection between the two events which demonstrates that the strike is the direct outcome of the unfair labor practices.' *John Cuneo, Inc.*, 253 N.L.R.B. at 1026. . . . The Board found nothing in the record to indicate that the *employees* were striking for any reason other than to gain recognition of the Union as their bargaining representative. We agree with the Board's characterization of the strikers' initial purpose as recognition. A lawful strike for union recognition is an economic strike, unless unfair labor practices committed by the employer are a 'contributing cause' of the strike. *Mere awareness of unfair labor practices is insufficient to establish the causal connection.* [citations omitted] The Board fairly read the record here when it concluded that the *employees'* purpose in striking the Company was only to gain recognition for the Union and not to redress the unfair labor practices . . .

*Road Sprinkler Fitters*, 681 F.2d at 20 (emphasis added).

In this case, the court recognized that the "'real and actuating motivation' for the strike" is the dispositive criterion in determining whether a strike was one for unfair labor practices,

906 F.2d at 724 (quoting *NLRB v. Pope Maintenance Corp.*, 573 F.2d at 906, and acknowledged that "the matter of the no-access provision [the unfair labor practice] was not specifically discussed at the strike meeting." *Id.* Nonetheless, the court inexplicably departed from the NLRB's test and its prior decision in *Road Sprinkler Fitters* when it held that the *union official's* subjective, unexpressed reasons for recommending a strike may provide the basis for establishing causation. *Teamsters*, 906 F.2d at 726.

Apart from conflicting with the NLRB's and its own precedent, the court of appeals' decision here also conflicts with the position of other circuits. In *NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691 (7th Cir. 1976), the Seventh Circuit held that although the union's representations about the nature of the strike (that it was an unfair labor practice strike) may have influenced employees to vote to strike, that "causal relationship should not obscure what was the real and actuating motivation." *Id.* at 706. In reaching its decision that the strike was not one for unfair labor practices, the court gave considerable weight to the employees' lack of any knowledge of the precise unfair labor practices the employer had committed. *Id.* ("The witnesses fell back when asked as to the reasons for the strike on the simplistic but non-detailed attribution of unfair labor practices.").

Likewise, in *Winter Garden Citrus Prod. Coop. v. NLRB*, 238 F.2d 128 (5th Cir. 1956), the Fifth Circuit rejected a union representative's contentions (as evidenced in two letters written by the representative) that the employees' strike was motivated by unfair labor practices as the "self-serving actions of a man who saw his cause slipping." *Id.* at 130. The court held that there must be proof of a causal connection between the unfair labor practice and the strike to justify a finding of an unfair labor practice strike; the evidence viewed as a whole failed to establish the requisite causal connection.

*Id.* at 129-30. In a more recent decision which held that employees engaged in a strike in part for the purpose of eliminating unfair labor practices, the Fifth Circuit noted that "union members engaged in a strike . . . cannot be insulated from the consequences of such a strike merely by mislabeling their action as a unfair labor practice strike." *NLRB v. Pope Maintenance Corp.*, 573 F.2d at 906. The Court was not confronted with such a situation, however, because the strike vote followed numerous and widespread violations of the National Labor Relations Act by the employer, of which the employees knew and which they testified caused them to strike. *Id.*

The Sixth and Ninth Circuits also have reached conclusions consistent with that urged by Petitioner and SPI in holdings that required clear showings that unfair labor practices were contributing causes of the strikes at issue. In *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814 (6th Cir. 1975), the employees discussed the employer's unfair labor practices at three separate meetings before they voted to strike. Substantial evidence also supported the conclusion that they were inclined to strike as a result of the unfair labor practices. *Id.* at 821. Accordingly, the Sixth Circuit was constrained to find the necessary causal connection between the employees' strike and the unfair labor practices. Finally, the Ninth Circuit found that unfair labor practices were a 'contributing cause' of a strike in *Airport Parking Management v. NLRB*, 720 F.2d 610 (9th Cir. 1983). The court was persuaded to reach this result by the evidence establishing that the employees unsuccessfully voted to strike before the unfair labor practice (wrongful discharge of an employee) but successfully voted to strike following the unfair labor practice.

## III. The Issue Presented Is Fundamental to Future Labor Relations Decisions.

The issue presented in this case is of considerable importance to employers, employees and labor organizations. Because the characterization of a particular labor strike, and thus whether employees are entitled to reinstatement and backpay, is a recurring issue in proceedings before the NLRB, it is crucial that the proper standard for making that determination be resolved. Until it is, employers will be considerably disadvantaged in reaching fair collective bargaining agreements with their employees. Employees and labor organizations, in turn, may face heightened hostility to their lawful right to full freedom of association and self-organization.

The court of appeals' decision, if allowed to stand, will unsettle the balance of power between competing interests in the context of collective bargaining and thus disturb the orderly and free flow of commerce. The important and recurring nature of the issue presented here warrants the Court's review.

## CONCLUSION

For the reasons stated above, the Court should grant the petition for a writ of certiorari and reverse the ruling of the court of appeals.

Respectfully submitted,

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